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JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 522

JANET R. PARKER,

Petitioner,

v.

CATHERINE R. HOWELL, CATHERINE S. CRESS, and CHARLES RICHARD SCHNEIDER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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IN THE

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No. .....

JANET R. PARKER,

Petitioner,

v.

CATHERINE R. HOWELL, CATHERINE S. CRESS, and CHARLES RICHARD SCHNEIDER,

Respondents.

IN THE MATTER OF THE ESTATE OF GERTRUDE LOUISE RICHARDS, DECEASED, WALKER BANK AND TRUST COMPANY, EXECUTOR.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Janet R. Parker, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah, entered May 16, 1956, and the denial of the petition for rehearing dated July 10, 1956.

Opinion Below

The opinion of the Supreme Court of the State of Utah (No. 8452) is reported at 297 P. 2d 542, ____ Utah 2d ____.

Jurisdiction

The judgment of the Supreme Court of Utah was entered on July 10, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the refusal of the State Court to instruct the jury on the burden of proof constitutes a denial of due process of law and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

2. Whether a judgment or a verdict or an order based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it, is arbitrary and capricious and constituted a denial to the petitioner of her property without due process of law.

3. Whether the verdict in this case takes away from a citizen her constitutional right or liberty to give her property to whomever she pleases and whether it denies to petitioner, Janet Parker, her guaranteed right to inherit property under the Civil Rights Act.

Statutes Involved

1. Article 22, Section 2 of the Constitution of the State of Utah provides that real and personal property of every female * * * may be conveyed, devised or bequeathed by her * * *.

2. Title 42, U. S. C. A., Section 1982 provides that all citizens of the United States shall have the same right in every state and territory * * * to inherit, purchase, lease, sell, hold, and convey real and personal property.

3. Article 1, Section 7 of the Constitution of the State of Utah provides that no person shall be deprived of life, liberty or property without due process of law as defined in Article 2, Section 26, Utah Constitution, to wit: The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise.

4. The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

5. The privileges and immunities clause of the Constitution of the United States, Article 4, Section 2.

Statement of the Case

SUMMARY

A testatrix, 78 years of age, in a hospital in Utah, suffering from diabetes, some ten days before she died, called a Walker Bank and Trust Company official and notified him that she had made a "terrible mistake" in her will; that she wanted to correct her mistake by adding a codicil thereto.

After an earlier version and some confusion on the part of the bank and its attorneys, a satisfactory codicil was drafted and signed by the testatrix June 25, 1954. Five days later she died.

In probate proceedings it was discovered that the codicil had revoked certain paragraphs of a prior will made ten years before and, instead of leaving her sister, Janet Parker, one half of the residue and the nieces of the testatrix the other half, had given the surviving niece $10,000.00 and the heirs of the deceased niece another $10,000.00, and the residue to the only sister of the testatrix, Janet Parker.

A caveat contesting the validity of the codicil was filed by the niece and heirs of the deceased niece of the testatrix. In the trial, the jury, being uninstructed (over objection) upon the burden of proof (apparently believing they could give away the property of the testatrix better than she could) and with only the most speculative of evidence to sustain them, overriding the great weight of direct and positive testimony, rendered a verdict that was to bring forth a comment from the trial judge to the effect that he was "surprised and amazed" at the verdict, and later, from the foreman of the jury, the remark that the basis upon which the jury reached their split decision had nothing to do with the issues of the case. Nevertheless it was decided that the testatrix was, on June 25, 1954, mentally incompetent to make a valid codicil.

Though disagreeing with the jury and aware of the lack of supporting evidence, the trial judge refused to grant a new trial, and the Utah Supreme Court affirmed in a decision directly in conflict with its own prior decisions and the decisions of the Federal Courts. (*In re* Chongas Estate, Fowler v. Porker, 115 U. 95-99; Chief Consolidated Mining Co. v. Salisbury, 210 P. 929 (Utah 1922); *In re* Swans Estate, 51 U. 410, 170 P. 452).

The verdict in this case, we submit, is of fundamental importance because it takes away from the testatrix her right or liberty to give her property to whom she pleases. It completely nullified Article 22, Section 2 of the Constitution of Utah. It tends to establish a rule that, "the dead hand rules succession only by sufferance of a jury".

In addition, the judgment violates the petitioner's civil right to inherit property as provided in 42 U. S. C. A., Sec. 1982, and is in direct conflict with the concept that no person shall be deprived of life, liberty or property with-

out due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article 1, Sec. 7 of the Utah Constitution as defined in Article 2, Sec. 26 of the Utah Constitution.

Reasons for Granting the Writ

1. The refusal of the State Court to instruct the jury on the burden of proof constitutes a denial of due process of law and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

This case reaches to the very heart of the rights of every citizen faced with the disposition of his property. It is a clear and shocking instance of the deprivation of a citizen's rights and liberties without due process of law. Material facts in the case, and material points of law—both law of the land and law of the jurisdiction—have been ignored in order to find against the petitioner. Less than due process of law was provided, since the rules of evidence and procedure were not strictly applied, and since the jury was improperly instructed; thus was there failure to uphold the doctrine that "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be deprived of the equal protection of the law".[1]

The fact of this case is that the codicil to the will of Gertrude L. Richards, whose testamentary competence has never been denied, has been set aside by jury verdict and an ensuing affirmation by the Supreme Court of Utah. Conscienceless and mercenary objection by distant relatives, contesting the clear will and intent of the deceased,

[1] The Chicago Junction Case, 264 U. S. 258, 262-265.
Northern Railway Co. v. Dept. of Public Works of Washington, 268 U. S. 39-42-45.
United Gas Public Service Comm. v. State of Texas, 303 U. S. 123.

has blocked conveyance of her estate to her natural heir as she explicitly directed.

But the point in force here is that the court of original jurisdiction failed strictly to apply the rules of evidence, and failed properly to instruct the jury in matters of law, particularly concerning the burden of proof that was to be carried by the contestants. The trial judge's statement justifying his refusal—that it was "given by implication" —was an admission of an error which allowed the jury to commence its deliberation without proper knowledge of the law to be applied, and so permitted them to make their verdict a matter of their own personal opinion and prejudice. On first appeal these errors were recognized by the Supreme Court of Utah by this statement:

> "It would seem to have been desirable to give the requested instruction for complete clarity of understanding by the jurors and certainly would not have been error to do so."

but they were permitted to stand. Thus have both testatrix and proponent been deprived, to this time, of the rights and of the due process guaranteed by the Constitution.

2. The judgment or a verdict or an order based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it, is arbitrary and capricious and constituted a denial to the petitioner of her property without due process of law.

A paid witness, only doubtfully qualified as an expert, who had never been seen the testatrix, gave negative, timorously hesitant and ambiguous testimony in response to hypothetical questions for which a factually incorrect foundation had been laid. His statements were to the effect that there *might* be *some* occasions upon which a person *in the condition hypothesized*, and thus by no means

in the same condition as Miss Richards, would lack testamentary competence. In this connection, the Court did instruct the jury that, unless it could be clearly shown that Miss Richards was in fact in the condition insinuated at the exact moment when the codicil was executed, her competence would have to be presumed. Yet the jury (in a split decision acted upon these statements as though they outweighed all the positive, direct and wholly corroborative testimony to the absolute contrary that was given not only by the physician who attended her at the time (and for twenty years previously), but also by the reputable and professionally eminent men who witnessed the instrument.

The Court admitted the "expert" testimony over objection. The Court knew the doubtful evidentiary value of the scantly qualified expert's uncertain and indefinite testimony, and even stated that doubtful value on page 22 of Dr. Currier's testimony, to wit: "If there are possibilities the other way, then of course, there is no help given". Yet the Court ignored the request of counsel and failed to instruct the jury as to where the burden of proof lay. After the trial, on motion for an order setting aside the verdict, * * * and in the alternative, for a new trial, the same Court announced from the bench that if the factual determination had been left to him he would have found the fact in favor of the testamentary capacity. The Court then listened politely and courteously to counsels' arguments on lack of evidence to support the special finding of the jury and stated his general dissatisfaction with the record in that regard. Nevertheless, that Court did not, as he was bound by duty to do,[2] set aside the jury verdict; nor was that verdict reversed upon appeal to the Supreme Court of Utah.

[2] King v. Union Pacific Railroad, 117 Utah 50, 212 P. 2d 692-696. Capital Traction Company v. Hoff, 174 U. S. 1.

No person ever testified, no person who had ever seen her maintained that Gertrude L. Richards was at any time incompetent to execute a legal instrument "except when she was asleep". Her physician, Dr. Galligan, testified: "Well, if I may generalize, I believe a person is competent if they are conscious and know the difference between right and wrong. I think if their memory is unquestioned, if they have the power of decision, that they have definite action in anything they do, and also the evidence of will power, to make decisions, *that* I thought Miss Richards had." (Emphasis supplied)

The three witnesses to the codicil, all men of legal and business training, testified, by direct and positive testimony, and in complete agreement, as to the clarity of her mind, and both the range and the precision of her recollection, even as to her one-time friendship with the late Judge Harold Stephens, former Chief Judge of the United States Court of Appeals for the District of Columbia, at the time the codicil was reviewed with her, signed, and duly witnessed in accordance with the laws of the State of Utah. Yet, unaccountably, except for the doubtful expert testimony of one who had never seen or observed the deceased, and the improperly instructed jury, the right of Gertrude L. Richards to bequeath and devise her property and her estate has been denied. Such denial extends to the long established law that jealously guards the freedom of testamentary disposition, and that does not deprive age and physical infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow them.[3] The law has been overruled and a jury permitted to set aside a codicil to a will merely upon suspicion aroused by allegation made but never sustained,

[3] Mackall v. Marshall, 135 U. S. 167, 34 L. Ed. 83.

or because the codicil did not conform to the ideas of some of the members of what the testatrix should have done. Despite the ordinarily effective safeguards of the law, this outcome was procured by the allegations that led,—however fortuitously— to proceedings that provided less than due process.

Some Court *must* now uphold the principles of evidence and the law; some Court *must* now examine this case and set aside the errors that have negated the equal protection and due process of law guaranteed by the Constitution of Utah and the Constitution of the United States. That Court must be the Supreme Court of the United States, for appeal to it is the sole remaining recourse. The present petition is the last effort possible to obtain that truly judicial hearing that may rightfully be claimed by every citizen looking to the legal system for support or redress. It is the last and only opportunity now remaining to obtain that truly judicial administration of the law that is guaranteed by the Constitution.[4]

3. The verdict in this case takes away from a citizen her constitutional right or liberty to give her property to whomever she pleases and whether it denies to petitioner, Janet Parker, her guaranteed right to inherit property under the Civil Rights Act.

The proceedings in this case took away from Gertrude L. Richards her sacred power and liberty to dispose of her property by last will and testament. In addition they have denied to petitioner her guaranteed right to inherit property under the Civil Rights Act. Ordinarily the law permits one to dispose of his property in any lawful manner he may wish, and a will or a codicil may not be invalidated simply because it might, by some, be considered unusual or

[4] Wilkerson v. McCarthy, 336 U. S. 53-64.
Herron v. Southern Pacific Co., 283 U. S. 91-95.
Capital Traction Co. v. Hof, 174 U. S. 1-13.

even unfair. In the state of Utah wide latitude has previously been given to dispose of property by will. In the Chongas Estate, Fowler v. Porker, 115 Utah 95-99, the Supreme Court of Utah said:

> "In Utah the law of wills recognizes degrees of mental unsoundness, not all of which are sufficient to destroy testamentary capacity. Ordinarily a person may lack sufficient capacity to transact his ordinary business affairs and yet have mental capacity to make a will. He need not have sufficient mental capacity to enter complex contracts or engage in intricate business in order to have sufficient mental capacity to make a will. Capacity to transact business generally and to carry on difficult negotiations are not essential to testamentary capacity."

The right to make a will is, like a contract, a matter of civil and political liberty. Any infringement of this liberty would necessarily be a violation of the liberty clause of the Fourteenth Amendment.[5] Gertrude L. Richards first exercised her liberty to make a will in 1946. She again exercised her liberty by adding a codicil some days before her death. Her closest living relative by blood, her sister, the natural object of her bounty, was the beneficiary of the residual estate in the codicil. The form and manner of execution of the codicil was never questioned in the trial Court. It is made clear by the evidence that the desires of the testatrix were embodied in this codicil. The sister was entitled, as a matter of law, to the substantial residuary of the estate, but as a result of the refusal of the trial Court to instruct the jury on the burden of proof she has been improperly denied the rightful possession of the property. Moreover, she has as well been denied what is intended by trial by jury. Justice Frankfurter states the rule to be that a trial by jury as guaranteed by the Constitu-

[5] McGrew v. Industrial Commission, 96 Utah 203, 83 P. 2d 608.

tion of the United States and by the several states presupposes a jury under proper guidance by a disinterested and competent trial judge.[6] This implies a jury under proper instructions as to the law.[7]

Conclusion

The principle involved herein is a broad application and interest, particularly to those citizens of mature years who have to consider the disposition of their property. The only issue in the case was the testamentary capacity of Gertrude Richards at the time she made the final codicil to her will. The record of trial shows complete and irrefutable testimony affirming her capacity by every definition of the law and of human understanding. There is no direct evidence whatsoever of incapacity. Yet, by a combination of judicial errors and incomprehensible disregard of the evidence, the Supreme Court of Utah has upheld a jury verdict which totally ignored the evidence and the issues of the case.

If the findings of this case are allowed to stand, doubt will surely be thrown on every cognizant citizen's belief in the security of his right to dispose of his property as he sees fit, and in the constitutional guarantee that he shall not be deprived of control of his property without due process of law. Failure to reverse the findings will leave many persons aware that a citizen received in that jurisdiction less than a fair trial and was then unable to obtain redress in the law. Improperly conflictive precedent will be set. Other citizens in that jurisdiction will have reason to know that they cannot fully trust in the validity there of previous judicial decisions and their rights may be carelessly or even haphazardly interpreted in proceedings not necessarily bound by law or precedent.

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[6] Wilkerson v. McCarthy, 336 U. S. 53, 54.
[7] O'Donnell v. Elgin J. & E. Ry. Co., 338 U. S. 384, 389, 394.
Carter v. Atlanta and St. Andrews Bay Ry. Co., 338 U. S. 430, 433, 434.

Therefore, we submit that the petition for a writ of certiorari should be granted, that the Supreme Court of the State of Utah should be reversed, and that the last codicil to the will of Gertrude L. Richards be given full force and effect.

Respectfully submitted,

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Appendix A

IN THE
SUPREME COURT OF THE STATE OF UTAH

No. 8452

In the Matter of the Estate of GERTRUDE LOUISE RICHARDS, deceased,

CATHERINE R. HOWELL, CATHERINE S. CRESS and CHARLES RICHARD SCHNEIDER,

Respondents,

v.

JANET R. PARKER,

Appellant,

WALKER BANK & TRUST CO., Executor.

FILED
May 16 1956
Clerk, Supreme Court, Utah

CROCKETT, Justice:

Gertrude Louise Richards died in Salt Lake City on June 30, 1954, leaving an estate valued in excess of $330,000. By a will executed March 20, 1946, she made a number of minor bequests and devised the principal portion of her estate one-half to her sister, Mrs. Janet Parker, and the other half to her nieces, Mrs. Catherine Richards Howell and Mrs. Eleanor Richards Schneider, the children of her deceased brother. The will also provided that in the event Mrs. Schneider predeceased testatrix the

Schneider children w
mother. The latter d
executed five days pr
the bequests to Mrs.
giving them in lieu t
and $5,000 to each o
named residuary lega

would succeed to the bequest of their
died in 1953. By a purported codicil
rior to her death, testatrix cancelled
Howell and the Schneider children,
thereof only $10,000 to Mrs. Howell
of the Schneiders; Mrs. Parker was
atee.

The will was admit
Mrs. Howell and th
called the contestants
A jury found that at
tatrix lacked testame
tered in accordance
proponent) appeals f

tted to probate without objection, but
he Schneider children (hereinafter
s) objected to admission of the codicil.
the time the codicil was executed tes-
entary capacity. A judgment was en-
with that finding. Mrs. Parker (the
from that verdict and judgment.

Appellant relies on
that the jury was not
was upon the contes
capacity; second, tha
sustain the verdict th
pacity.

two main points for reversal: First,
t properly instructed that the burden
stants to prove lack of testamentary
t there was not sufficient evidence to
hat testatrix lacked testamentary ca-

Respondents do not
in this jurisdiction is
testamentary capacit
trial judge refused to
tion to that effect, in
by implication." The

t question that the law as established
s that the burden of showing lack of
ty was upon the contestants.[1] The
o give proponent's requested instruc-
ndicating thereon that it was "given
court submitted the case to the jury

[1]See *In re* Swans' Estate, ___Utah 2d ___, 292 P. 2d 682; *In re* Hanson's Will, 50 Utah 207, 167 Pac. 256; *In re* Van Alstine's Estate, 26 Utah 193, 72 Pac. 942. A number of authorities state the rule to be that the proponent has the ultimate burden. See IX Wigmore sec. 2500, 68 C. J. 444-448, Wills secs. 43, 44, on the ground that testator's soundness of mind is an essential element of proponent's case. However, in view of the presumption of competency which continues with proponent throughout the case and which must be overcome by a preponderance of the evidence, our rule seems to be the more direct approach to the same result.

by giving them only three interrogatories and directing them to place an "X" opposite the proposition with which they agreed.

> "Proposition 1. Gertrude Louise Richards at the time of making the codicil dated June 25, 1954, was of sound and disposing mind. ( )
> "Proposition 2. Gertrude Louis Richards at the time of making the codicil dated June 25, 1954, was not of sound and disposing mind. (X)
> "Proposition 3. The evidence is so equally divided that the jurors cannot determine either Proposition 1 or Proposition 2. ( )"

Six of the eight jurors found in favor of Proposition 2.

The function of an instruction on burden of proof is to tell the jury how it should weigh the evidence. Where the evidence is so equally balanced that it is impossible to say on which side lies the greater probability of truth, or where the preponderance of the evidence is against the truth of a certain proposition, a verdict must be returned against the party who has the burden, because he has failed to show that his allegation is more convincing as to its truth, when weighed against the evidence opposed to it.[2] Thus, in the instant case, if the jurors had agreed with Proposition 3, that the evidence was equally balanced, the judgment would have been in favor of proponent, for a testator is presumed competent until the contrary is shown by the preponderance of the evidence.[3] However, the jury, by finding in accordance with Proposition 2 over Proposition 3 necessarily rejected the contention that the evidence was evenly divided and indicated that they believed that the greater weight of evidence lay in favor of lack of capacity. It would seem to have been desirable

[2] E. g., *In re* Buttar's Estate, ___ Utah ___, 261 P. 2d 171; Tremelling v. Southern Pac. R. Co., 51 U. 189, 170 Pac. 83.
[3] See *In re* Swan's Estate, ___ U. 2d ___, 293 P. 2d 682 and authorities cited therein at n. 3; Note 1, *supra*.

to give the requested instruction for complete clarity of understanding by the jurors and certainly would not have been error to do so. Yet, a refusal to give an instruction cannot be the basis for reversal unless the jury was insufficiently advised of the issue they were to determine, or it appears that they would have been confused or misled to the prejudice of the person complaining thereof.[4] From the finding of the jurors, it seems clear that they believed that incompetency was proved by the greater weight of the evidence.

In considering the sufficiency of the evidence it is meet to first treat certain issues relating to the admissibility of evidence. A factual background is required: Testatrix was 78 years of age. She had been confined to a hospital from May 21, 1954 to the date of her death for treatment of uncontrolled diabetes. The disease was never brought under control during her stay in the hospital, and she fluctuated between diabetic coma and insulin shock. Her condition was aggravated by hardening of the arteries; a grossly enlarged heart that resulted in heart failure; she had fluid in the lungs and a shortness of breath that necessitated administration of oxygen during her stay in the hospital; suffered from a marked mineral deficiency, was debilitated by frequent nausea and vomiting and was incontinent. It was necessary to supply her food and liquid needs intravenously. Her condition continued to deteriorate during her confinement and until her death on the 30th of June.

Proponent assigns as error the admission of the hospital records, claiming that they were incompetent because hearsay. This same issue was presented in Clayton v. Metro-

[4] Rule 61, U. R. C. P.; Ogden Comm. Co. v. Campbell, 66 U. 563, 244 Pac. 1029.

politan Life Ins. Co.[5] In that case, although we affirmed the refusal of the trial court to admit the entire record because an improper foundation had been laid, we observed:

> "Before such records can be admitted in the absence of statute, the offering party must show the necessity of admitting the records without requiring the person or several persons who made the records to testify. He must then show the custody from which the records were taken and that they were prepared in the due course of hospital work."

In the instant case there was adequate foundation from which the trial judge could find the records credible, reliable and hence, admissible. The medical records librarian testified that she was the custodian of the records, and that although she did not make the entries herself, she was familiar with them and that they were prepared in the ordinary course of hospital business[6] An intern assigned to take care of testatrix supplemented her testimony, explaining both the nature and the regularity of the keeping of such records.

Both the Clayton case, *supra*, and State v. Davie,[7] which relied upon it, indicate our approval of modification of the old "shop book" rule. In the Davie case we approved the admission of records shown to have been kept in the regular course of business. Implicit from the holding of the Clayton case and the authorities there relied upon is that the regularity and routine of entering the medical data required by hospital records, carry with them sufficient guarantees of credibility to render them worthy of consideration. There is an additional reason, although it is not necessarily controlling, why hospital records should be regarded as sufficiently trustworthy to be received in evi-

[5] 96 U. 331, 85 P. 2d 819.
[6] See Northcrest, Inc. v. Walker Bank & Trust Co., — Utah —, 248 P. 2d 692.
[7] — Utah —, 240 P. 2d 265.

dence: These records are relied upon for the treatment of patients and the preservation of human life. Any motive for falsifying them by doctors or the staff appears to be lacking. And further, the law now requires that such records be kept and any false or fraudulent entry therein is made a crime.[8] In such circumstances, and considering the unfortunate consequences that a contrary ruling would have on both hospital and judicial administration were every entrant to be called to explain his notations, we hold that the hospital records were properly admitted.

Another problem respecting the admission of evidence relates to questions put to Dr. Currier, a psychiatrist, who testified concerning testatrix' mental competency. He never saw her and his testimony, therefore, was necessarily based on hypothetical questions. The proponent argues that the doctor was permitted to base his testimony upon abstractions and conjectures which had no basis in evidence, particularly, that he used the opinions, inferences and conclusions of others set out in the hospital records. Our decision that such records were properly admitted largely disposes of the proponent's claim that the question consisted of abstractions and conjecture. It appears that the hypothetical question was not an unfair summary of the condition of testatrix as reflected by the hospital records supplemented by the testimony of the physicians who attended her. Concededly there was dispute as to whether some of these conditions actually existed, but this court has long recognized that where the facts are in dispute, hypothetical questions may be framed either upon all the facts of the case, or upon facts which fairly represent the theory of the party producing the expert.[9]

[8] S. L. U. 1953, Ch. 42, § 5, subd. 5, now Sec. 26-15-58 U. C. A. 1953.

[9] E. g., Lindsay Land & Livestock Co. v. Smart Land & Livestock Co., 43 U. 554, 137 Pac. 837; Mary Jane Stevens Co. v. First Nat. Bldg. Co., 89 U. 456, 57 P. 2d 1099. See McCormick, Evidence, Sec. 14, p. 31.

The remaining claim of error in regard to the admission of evidence is that Dr. Currier, the psychiatrist, was permitted to state that the deceased suffered from a mental "senility," and to assume part of his hypothesis was that the testatrix was "senile," when there was no basis in the evidence therefor. There was foundation for this hypothesis both from the hospital records and from the testimony of Dr. Copeland, the intern who made the diagnosis when testatrix was admitted to the hospital. The difficulty arises because Dr. Copeland explained that

> "* * * 'senility' * * * has a connotation of both physical and mental senility. In this regard I meant to imply from the word 'senile' just failure of her physical being."

Dr. Currier, on the other hand, defined "senile" as also

> "* * * a mental condition which is characteristic of the latter decades of life * * * which is characterized by intellectual deterioration, that is, loss in thinking and reasoning power, with particular reference to losses of recent memory and with frequently various states of confusion."

Dr. Copeland admitted that senility included this mental condition and that it was his impression that testatrix was slow in her thinking processes, which would be some indication of the mental senility assumed by Dr. Currier.

It is further to be noted that the only objection proponent made to the hypothetical question at the trial was the generalized one that it misstated testatrix' physical condition and that it did not include some known factors without specifying what the claimed defects were. The rule is that in order to preserve the objection for review on appeal on such grounds the objector must point out specifically what he claims was erroneously included or omitted,[10] which proponent failed to do.

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[10] Mahany v. Kansas City R. Co., ___ Mo. ___, 254 S. W. 16; 3 Am. Jr. Appeal and Error, Sec. 358. To same effect generally see Culmer v. Clift, 14 Utah 291, 47 Pac. 85, 3 Am. Jur., Appeal and Error, Sec. 265; McCormick, Evidence, Sec. 52.

Counsel further suggests that the answers of this expert were so uncertain and vague that they should not have been submitted to the jury, citing Moore v. D. & R. G. W. R. Co.[11] This is an erroneous interpretation of that holding. That case recognized that the mere use of such words as "belief," "impression," "probability," or "possibility" did not render testimony inadmissable, but held that in the particular context the qualifying phrases rendered the testimony too insubstantial when standing alone to support the verdict.

Having thus determined that the evidence was properly admitted, we proceed to assay whether upon all of the evidence the finding of lack of testamentary capacity can be sustained. The proponent relied heavily upon the fact that both of the subscribing witnesses testified that in their opinion testatrix was in command of her faculties on the afternoon of June 25, 1954.

It is conceded that the uncontroverted testimony of eye-witnesses may not arbitrarily be disbelieved by the trier of the facts.[12] But it must also be recognized that a fact finder need not accept a fact as established merely because a witness so testified, if there is any circumstance which would render the testimony improbable or doubtful.[13]

First of all, in the instant case, it should be noted that the subscribing witnesses were not experts and their opin-

[11] 4 Utah 2d 255, 292 P. 2d 849.

[12] E. g., Leavett v. Thurston, 38 Utah 351, 113 Pac. 77; Karren v. Blair, 63 Utah 344, 225 Pac. 1094. Compare: Kent v. Ogden, L. & I. Ry. Co., 50 Utah 328, 167 Pac. 666. (Plaintiff held bound by uncontradicted testimony of witnesses introduced by him.)

[13] The more obvious instances when such testimony may be discounted include when it is contrary to physical facts (Perrin v. U. P. R. Co., 59 Utah 1, 201 Pac. 405, cert. denied, 257 U. S. 661); or is characterized by omissions, uncertainties, or self-contradictions (Miller v. Columbia Trust Co., 63 Utah 305, 225 Pac. 609); or is based on ignorance, confusion or mistake (Jensen v. Logan City, 96 Utah 522, 88 P. 2d 459, affirming, 96 Utah 53, 83 P. 2d 311); or where bias, prejudice, or interest in the outcome of the decision is shown (McGowan v. Denver & R. G. W. R. Co., ___ Utah ___, 244 P. 2d 628; Patterson v. Blair, ___ Utah ___, 257 P. 2d 944; Nichol v. Wall, ___ Utah ___, 253 P. 2d 355).

ions were only those of lay persons and therefore should not be given undue weight.[14] Second, the witnesses have an interest in the outcome which always may be taken into consideration as a factor which may discount testimony.[15] This is not limited to where the witnesses are actual parties or have a direct pecuniary interest, but in addition, there may be the case—as here—where the witnesses (both connected with the executor, either as employees or counsel) have an interest by way of vindicating the propriety of their conduct. Such matters are of particular importance to consider under circumstances where those whose rights are affected were not present when events which later prove to be of critical importance transpired. They are left to accept the testimony of those who were present or to discredit it by showing adverse interest, inconsistencies, unreasonableness or other weaknesses therein. Our survey of the evidence must be with a view of determining whether contestants succeeded sufficiently to provide a reasonable basis on which the jury could believe that testatrix lacked the capacity to execute a codicil.

Since contestants prevailed below, all the evidence and every intendment and inference which may fairly be drawn therefrom must be viewed in the light most favorable to them.[16] It cannot be doubted that because of her multifarious ailments testatrix was in the extremity of illness and was becoming progressively worse. She was fluctuating between diabetic coma and insulin shock; was often semi-comatose and was stuperous while the subscribing witnesses were there for the purpose of executing the codicil. Dr. Copeland came into the room to give an intravenous injection of chloride. Testatrix told Dr. Copeland that she had some very important business to perform and wished that

[14] *In re* Hanson's Estate, 87 Utah 580, 52 P. 2d 1103.
[15] See McGowan v. D&RGWRR, ___ Utah ___, 244 P. 2d 628; Nichol v. Wall, ___ Utah ___, 253 P. 2d 355.
[16] Toomer's Estate v. Union P. R. Co., ___ Utah ___, 239 P. 2d 163.

he would wait. But Dr. Copeland interrupted the conference, insisting that she do "what I ask you to do, and I want you to do it now." The doctor testified that the purpose of the feeding was to alleviate testatrix' stupor.

Dr. Currier testified to the individual effects of testatrix' ailments upon the ability of her brain to function, and concluded that in his opinion the collective result would be that

> "* * * [such a person as testatrix] would be fighting a very difficult battle to maintain her clarity of thinking. I would expect that a person between diabetic acidosis and insulin shock would probably be in some state of confusion and perhaps disorientation, at least some of the time. How much would depend entirely upon the severity of swings from one side to the other, because that is what happens, with coma being the end result on either side for opposite reasons.
>
> "I suppose you might say it is like a person walking along a very treacherous narrow pathway between a mountain precipice on one side and a roaring river on the other side. It is very difficult to stay on the path. If you deviate either way a little bit, you are likely to be in very serious trouble * * *
>
> "[And further] it would seem to me highly unlikely that a person in this medical situation would be in a state of mind to make any decision of lasting or serious importance."

Besides the evidence as to her mental state and her illness, the jury was doubtless influenced by the following circumstances which indicate at least some degree of mental confusion: Testatrix executed another codicil on June 21, 1954, in which she increased the bequests to Mrs. Howell by $10,000 and to the Schneider children by $5,000 each. This codicil was revoked, apparently upon the assumption by the employees of the executor that the testatrix intended to change the disposition of her property in the manner indicated by the June 25 codicil now in dispute.

Such an instrument was submitted to testatrix on June 24, by Mr. Athol Rawlins, counsel for executor. Upon observing her, he declined to act as a witness. His testimony was that he felt that she was in no condition to execute a codicil. It was the next day, June 25, that the questioned codicil was signed.

We remain cognizant of the fact that the law does not require that a person be particularly alert, nor need he have any special acumen in order to execute a will. He need not be able to operate a business or do other things which he might normally do in the prime of life. All that is required is that one have sufficient mental capacity to exercise judgment as to who are the natural objects of his bounty, to recall the character and extent of his property, to form some understandable plan for the disposition thereof, and to follow such a plan of one's own free will and volition.[17] But it is to be remembered that this is a case in which the jury has made a finding that the testatrix did not have such capacity, which finding will not be disturbed if there is any reasonable basis in the evidence to support it. Surveying all of the evidence as to her mental state and concerning the extremity of her illness we cannot say that there was no substantial evidence upon which to base a finding that Miss Richards lacked testamentary capacity.

Judgment affirmed. Costs to contestants.

We Concur:

ROGER I. McDONOUGH,
Chief Justice.

LESTER A. WADE,
Justice.

Henriod and Worthen, *JJ.*, concur in result.

[17] See *In re* Hanson's Estate, 87 Utah 580, 52 P. 2d 1103, 1117.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 522

JANET R. PARKER,

Petitioner,

v.

CATHERINE R. HOWELL, CATHERINE S. CRESS, and CHARLES RICHARD SCHNEIDER,

Respondents.

In The Matter of the Estate of Gertrude Louise Richards, Deceased, Walker Bank and Trust Company, Executor.

BRIEF OF RESPONDENTS

THE COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT

28 U. S. C. § 1254(1) invoked by Petitioner does not purport to confer any jurisdiction to review a judgment of

a state court. Assuming Petitioner intended to invoke 28 U. S. C. § 1257(3), this court is without jurisdiction to review the judgment of the Supreme Court of Utah for the reason that no federal question is involved or has been decided by the State Court. No treaty or statute of the United States was drawn in question, nor was any state statute attacked upon any ground. At no stage of the proceedings did Petitioner assert that she had been denied any title, right, privilege or immunity guaranteed by the Constitution of the United States or by any federal statute. Each and every issue raised or decided in the State Courts involved only local law and procedure.[1]

The record discloses no more than a simple will contest involving the testamentary capacity of the testatrix five days before her death. The issue was submitted to a jury whose verdict has been approved by the trial judge and the unanimous decision of the Supreme Court.

Petitioner's assertion that the evidence was insufficient to support the verdict, and that the jury was inadequately instructed upon the burden of proof would not, even if supported by the record, which they were not, present anything more than matters of local procedure and law. Constitutional rights and federal questions which this court has jurisdiction to review are not raised by mere allegations in a petition for a writ of certiorari.[2]

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[1] *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107; *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158.

[2] *Citizens Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, 19 S. Ct. 530, 43 L. Ed. 840.

No right of Petitioner under the Civil Rights Act (42 U. S. C. § 1982) was asserted or denied in either of the State Courts. That statute is directed against governmental action which discriminates between citizens of the United States on account of race or color.[3]

Petitioner did not assert any right of inheritance and none was denied. She claimed all of the estate of her deceased sister under a will and an alleged codicil. The will gave Petitioner more than she would have inherited under the laws of Utah. This share of the estate she received. She claimed all of the estate under the codicil which was declared to be invalid. She was accorded the same process of law as is accorded to every citizen called upon to defend a lawsuit in the Utah courts.[4]

We respectfully submit that the petition should be denied.

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Of Counsel:

DENNIS McCARTHY,
1311 Walker Bank Building,
Salt Lake City, Utah.

November, 1956.

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[3]*Hurd* v. *Hodge*, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187.
[4]*Moffett* v. *Commerce Trust Company*, CCA Mo. 1951, 187 F. 2d 242, Cert. Denied 72 S. Ct. 32, 342 U. S. 818, 96 L. Ed. 618, Rehearing Denied 72 S. Ct. 163, 342 U. S. 879, 96 L. Ed. 661.

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IN THE

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October Term, 1956

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CATHERINE R. HOWELL, CATHERINE S. CRESS, and CHARLES RICHARD SCHNEIDER,

Respondents.

In the Matter of the Estate of Gertrude Louise Richards, Deceased, Walker Bank and Trust Company, Executor

PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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2. The failure of the trial court to instruct the jury on the burden of proof at the request of the petitioner amounted to a denial of what is intended by trial by jury 4

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"No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws".

In The

Supreme Court of the United States

October Term, 1956

No. 522

Janet R. Parker,

Petitioner,

v.

Catherine R. Howell, Catherine S. Cress, and Charles Richard Schneider,

Respondents.

In the Matter of the Estate of Gertrude Louise Richards, Deceased, Walker Bank and Trust Company, Executor

---

PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Janet R. Parker, petitioner, presents her petition for a rehearing of this Court's order dated December 10, 1956, denying the petition for a writ of Certiorari to the Supreme Court of the State of Utah, and, in support thereof, respectfully shows as follows:

Point 1.

THE COURT OF ORGINIAL JURISDICTION, IN FAILING TO STRICTLY APPLY THE RULES OF EVIDENCE, OR TO PROPERLY INSTRUCT THE JURY CONCERNING THE BURDEN OF PROOF TO BE CARRIED BY THE CONTESTANTS HAS DENIED PETITIONER THE PRIVILEGES AND IMMUNITIES GUARANTEED TO CITIZENS OF THE UNITED STATES.

It is universally agreed that by virtue of Article 4 Section 2 of the 14th Amendment to the Constitution of the United States that the privileges and immunities of the citizens of all free governments, cannot be abridged by the States.

Slaughter House Cases—16 Wall 36. Further the privileges and immunities which are common to citizens in those states under their constitution and laws by virtue of their being citizens therein. Paul v. Virginia 75 US 168.

This case reaches to the very heart of these privileges and immunities. Material facts in the case, and material points of law—both the law of the land and law of the jurisdiction, have been ignored in order to find against the petitioner.

Petitioner, Janet Parker, was declared to be a non-resident of the State of Utah. Respondent, Catherine Howell, was declared a resident of the State. Prior to the decease of Gertrude Louise Richards, certain rules of law were firmly established in the State relating to jury trials guaranteed by the State Constitution, Article 1, Section 10. One of these rules of evidence and law concern the burden of proof in cases where testimentary capacity is at issue.

Heretofore the Court always endeavored to instruct the jury as to the burden of proof. Suddenly, though requested to do so, and for no apparent reason, the trial judge refused to instruct the jury on the burden of proof for the petitioner. His statement justifying his refusal—that it was "given by implication"—was an admission of an error which deliberately allowed the jury in this case to commence its deliberations without proper knowledge of the law to be applied; or how to decide the facts from the evidence submitted, and so permitting them to render a decision against the petitioner which was based on their own personal opinions and prejudices against non-residents.

On first appeal these errors were recognized by the Supreme Court of Utah by the following statements. (Petitioner's Petition P. 15, 16)

> "The function of an instruction on burden of proof is to tell the jury how it should weigh the evidence. Where the evidence is so equally balanced that it is impossible to say on which side lies the greater probability of truth, or where the preponderance of the evidence is against the truth of a certain proposition, a verdict must be returned against the party who has the burden, because he has failed to show that his allegation is more convincing as to its truth . . . It would seem to have been desirable to give the requested instruction for complete clarity of understanding by the jurors" . . .

Nevertheless this recognized error was permitted to stand and both, testatrix and petitioner, have been deprived to this time, of the privileges and immunities of residents of the State of Utah, or the equal protection of the law relating to jury trials within the State.

The above statement of the State Supreme Court of Utah implies that the requested instruction to the jury, as made by the petitioner, on the burden of proof is a proper duty of the trial judge in all jury trials within

the State; that it is usually given, but that in this case it was not given even though it would have been desirable to do so. In this manner, the jury was allowed to discriminate against a non-resident in favor of a local resident.

Point 2.

THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON THE BURDEN OF PROOF WAS A DENIAL OF WHAT IS INTENDED BY TRIAL BY JURY.

Justice Frankfurter stated the rule to be that a trial by jury as guaranteed by the Constitution of the United States and by the several states presupposes a jury under proper guidance by a disinterested and competent trial judge. Wilkerson v. McCarthy 336 US 53, 54. This implies a jury under proper instructions as to the law. O'Donnell v. Elgin J. & E. Ry. Co., 338 US 384, 389, 394.

The term "trial by jury" is, and for ages has been, well known in the meaning of the law. It was used at the adoption of the constitution, and always, it is believed, before that time, and almost always since that time, in a single sense:

A jury for the trial of a cause is a body of men, described as being upright, disinterested and impartial, free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, duly sworn to render a verdict according to the law and the evidence given them, and who, after hearing the evidence, and receiving instructions from the court as to the law involved in the trial, decides the facts of the case from the evidence adduced at the trial.

The province of the jury is strictly limited to questions of fact, and within that province they are further restricted to the consideration of matters proved by evi-

dence in the co course of the trial. They must submit to the direction of of the judge as to any rule or principle of law that may b be applicable to the case. They are not, like the judges, es, members of a class charged with the duty of judicial ial inquiry. Hence a body of men selected as a jury, but it not subject to judicial direction in the hearing of the ca case or in making up their findings, is not a jury, within th the meaning of the constitution. Capital Traction v. Hof of 174 US 1, 13; Slocum v. New York Life Insurance Compa pany 228 US 364.

Petitioner has as a right to a full statement of the law on burden of proof f from the trial court—neglect to give such statement is rev eversible when the jury consequently falls into error. Bird rd v. United States 180 US 356. Moreover, as was the case se with petitioner, the refusal of the trial court to give a r requested instruction is a reversible error where the conclusion is irresistible from the evidence that the jury based it its award on a mistaken theory . . . and the refusal was not corrected by general observations in the main on the particular question, no matter how correct they might it have been. Pennsylvania Railroad v. Jacoby and Com mpany 242 US 89; Carlton v. Utah 130 US 83.

The necessity of these rules to the petitioner is seen from an examination of the evidence in the case of petitioner herein. No No person ever testified, indeed not even the contestants, and no person who had ever seen her maintained, that Gertrude Louise Richards was at any time incompetent it to execute a legal codicil to a legal will previously executed "except when she was asleep". Her physician of twenty seven years, Doctor Galligen, when asked his interpretation of competency, (Trans of Record p. 284) testified:

"Well, if I may generalize, I believe a person to be competent if they are conscious and know the difference between right and wrong. I think if their memory is

unquestioned, if they have the power of decision, that they have definite action in everything they do, and also evidence of will power, to make decisions, that I thought Miss Richards had."

The three witnesses to the codicil, all men of legal and business training, who had observed or known Miss Richards, testified, by direct and positive testimony, and in complete agreement, as to the clarity of her mind, and both the range and precision of her recollection at the time the codicil was reviewed with her, signed, and duly witnessed in accordance with the laws of the State of Utah. Yet, unaccountably, except for the doubtful testimony of a paid witness, only doubtfully qualified as an expert, who had never seen or observed the deceased; but who gave negative, timorously hesitant testimony to the effect that there might have been some occasions upon which a person in the condition hypothesized for Miss Richards (upon factually incorrect foundation) would lack testimentary competence. The jury, being uninstructed on the burden of proof, denied Gertrude Louise Richards, her right to bequeath and devise her property, as she explicitly directed. The law of evidence has been overruled and a jury permitted to set aside the kindly ministrations of affection displayed by the deceased upon mere suspicion aroused by allegations made but never sustained, or because the codicil did not conform to the ideas of some of the members of the jury as to what the deceased should have done to comply with their own point of view.

This despite the long established law, in both the Courts of Utah and this Court as rendered by this Court in Aetna Life Insurance Company v. Moore 231 US 543 wherein this Court held that the State Court was in error by its refusal to instruct the jury in the case on which they were sitting, that an untrue answer in a life insurance policy, if material, would avoid the policy, regard-

less of the good faith of the party, and that the refusal called for a reversal of the judgment entered on the general verdict, where the evidence as to untruthfulness was conflicting, because by the verdict being general, it was impossible to say what view the jury took.

Moreover, this Court in United Protherhood C.T. v. United States 330 US 395-91 L. Ed. 973 stated that failure to charge the jury correctly is not harmless where the verdict may have resulted from the incorrect instruction; and that the error was aggravated by the Court's failure to give correct charge on request. And to the same effect Bruno v. United States 308 US 287.

The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a proper verdict, so far as it is competent for the court to assist them. Indeed, one of the most important duties of the Court is to expound the law to the jury, and in its instructions it should inform the jury as to the burden of proof. The law of every case belongs to the Court; and in a jury trial it is not only the prerogative of the judge, but his solemn duty to declare it, especially where requested to do so. The reason was long ago stated in Pleasants v. Font 89 US 116, 121 thus:

"It is the duty of a court in its relation to the jury, to protect the parties from unjust verdicts, arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to the jury the issues they are to try, and by instructing them in the rules of law by which the evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or is contrary to law." All of which has to this time been denied to the petitioner.

ONCLUSION

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in proceedings not necessarily bound
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a rehearing should be granted to
with previous decisions of the Courts
rm to the rule of this Court to review
ourt where a Federal right has been
a finding shown by the record to be

without evidence to support it. United Gas Public Service Comm. v. State of Texas 303 US 123.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

I John J. Spriggs Jr, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioner.

.....

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